

SECRET & E-11-101-100

FED MAIL SECTION
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 98M-18

80426

In Matter of)
JAMES A. KAY, JR.)
Licensee of one hundred fifty two)
Part 90 licenses in the)
Los Angeles, California area.)
WT DOCKET NO. 94-147

O R D E R

Issued: January 29, 1998 ; Released: February 2, 1998

This is an expedited ruling on "Emergency Motion For Protective Order" that was filed by James A. Kay, Jr. ("Kay") on January 26, 1998. The "Wireless Telecommunications Bureau's Opposition To Emergency Motion For Protective Order was filed on January 28, 1998.

On December 10, 1997, pursuant to notice and subpoena, the Bureau deposed Mr. Vincent Cordaro ("Cordaro") as a potential witness in this proceeding. Kay's counsel was present at and participated in the deposition. The deposition could not be completed and was reset by agreement among the attorneys for February 2, 1998. At the deposition of December 10, 1997, Cordaro produced documents that were sought by a Commission subpoena. Among the documents produced were two computer diskettes. Cordaro was a former Kay employee. According to a Declaration of Craig Sobel ("Sobel"), accountant for Kay, dated January 23, 1998, Mr. Cordaro was in the possession of "computer diskettes containing confidential information from Mr. Kay's business that he claimed I provided to him." Sobel denies that he gave the diskettes to Cordaro. Sobel concluded on his own that the information was confidential and belonged to Kay.

There is no mention in the Emergency Motion of an objection being made at the deposition to the receipt or the use of the diskettes by the Bureau. The excerpts of the deposition transcript attached to the Emergency Motion do not reflect any objection or concern. It is not clear that Sobel did not provide Cordaro with the database information that ended up on the diskettes. Cordaro testified that "I was given the information by Craig Sobel." There can be no conclusion drawn from the information furnished in the emergency Motion that Cordaro actually stole the diskettes or the data that is recorded on the diskettes.

It appears from the pleadings that the diskettes contain relevant information about Kay's customer base, accounts receivable, accounts payable and the base frequencies assigned to Kay's customers. This is information which is relevant to the issues. The deposition should go forward with the examination of Cordaro on the diskettes' information. There is no attorney or work-product privilege with respect to the materials or the database. After the deposition is completed and there has been an opportunity for Cordaro to review and sign the transcript, Kay may move to have the diskettes and

portions of the transcript designated and treated in this proceeding as confidential data. Any confidential protection afforded now would be premature.¹ Kay will have the burden of establishing an entitlement to confidentiality. However, since there remains a question of fact with regard to how the information was obtained and how it should be treated under Commission rules, the diskettes and the transcript shall remain non-public until further order.

It has not been established that Cordaro came into possession of the diskettes wrongfully. Certainly, the Bureau's possession was not wrongful. In Pilsbury, Madison & Sutro v. Schectman, 64 Cal. Rptr. 698 (1st App. Dist. 1997) the purloined documents were used by a party to advance a civil litigation. Here the evidence was produced in response to a Commission subpoena by a potential Bureau witness. There was no objection made at the deposition and there was no objection raised at the Prehearing Conference that was conducted on January 21, 1998. There is no explanation offered as to why this matter is being presented only now as an "emergency." On December 10, 1997, the Bureau obtained the evidence fair and square in response to a subpoena. Cordaro was not acting as an agent of the Bureau when he obtained the diskettes. Therefore, the Bureau cannot be considered to have engaged in "self-help" discovery.

Hypothetically, even if Sobel obtained the diskettes or the information thereon in an unlawful manner under state law, the Bureau obtained the evidence lawfully and mere acceptance of the diskettes from Cordaro through the Commission's discovery procedure does not require exclusion in this case. N.L.R.B. v. South Bay Daily Breeze, 415 F.2d 360 (1969). Cf. United States v. Logan, 423 F. Supp. 146 (S.D. Ill. 1976) (where non-party witness may have violated law by tapping phone calls, the tapes of the calls were not excluded as evidence since the surveillance was done independent of the government). The deposition must go forward and the question of confidential treatment in this case will be taken up at a later time.

Ruling

Accordingly, IT IS ORDERED that the Motion For Expedited Consideration is granted and the Emergency Motion For Protective Order filed by James A. Kay, Jr. on January 26, 1998, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION²



Richard L. Sippel
Administrative Law Judge

¹ If the information on the diskette is essential to a decision in this case, it will probably be placed on the public record no later than issuance of an initial decision.

² Courtesy copies of this Order were faxed or e-mailed to counsel on the date of issuance.